UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of: FLOYD E. BENNETT v. DEPARTMENT OF THE NAVY	Docket No. DC075299011-80-81

OPINION AND ORDER

By letter dated July 18, 1979, attorney Harvey L. Taylor submitted a petition for review, on behalf of appellant Floyd Bennett, from the June 15, 1979 decision of the Washington, D.C., Field Office of the Board. The decision of the presiding official at the field office dismissed the appeal to that office based on a finding that appellant had failed to prosecute it.

The record shows that appellant was an employee of the Naval District of Washington, D.C., who was removed from his position as Rigger, pursuant to advance notice dated January 30, 1979 and decision of March 5, 1979, for the stated reason of "deliberate refusal to carry out a proper order from your supervisor." The removal action was effective March 9, 1979. By letter of March 23, attorney Taylor purported to submit an appeal to the Board. In response, a letter dated April 12 was sent to him which stated that the appeal would be processed in accordance with the Board's regulations in Part 1201 of Title 5 of the Code of Federal Regulations (CFR), and provided general information concerning the adjudiction of appeals. A "Designation of Appellant's Representative" form was enclosed with the letter with a specific direction that the form be filed with the field office within 10 days of receipt if no designation of representative, signed by the appellant, had already been submitted with the letter of appeal. In the instant case, no such designation had been submitted with the March 23 letter.

At the same time that this letter was sent to the petitioner, a similar letter was forwarded to the respondent. By letter of April 26, the agency replied to the notification. No response was received from appellant or on his behalf. Accordingly, by letter of May 4, 1979, the presiding official who had been assigned to the case notified the parties that the record would close on May 18, and that this was the final date for receipt of submissions from both parties. The notice was addressed to petitioner Taylor, but copies were sent to appellant and the agency's representative. The last paragraph of

the letter notified the recipients that appellant's written designation must be received by the expiration of the time limit set for the closing of the record and that "Failure to receive the designation may result in cancellation of the appeal."

The record reflects receipt of no further representations from the parties by the presiding official, and on June 15, 1979, her decision was issued. In it, she recounted the processing of the case; made reference to section 1201.31(a) of the Board's interim regulations, which required that parties immediately designate their representatives in writing; and cited section 1201.43(b) of the regulations, which stated that if a party fails to prosecute an appeal, "the presiding official may dismiss the action with prejudice." She then concluded, from the appellant's failure to designate a representative in writing or otherwise to communicate with the Board, that he had failed to prosecute his case, so that imposition of the sanction of dismissal was warranted.

As stated above, attorney Taylor petitioned the Board for review of the presiding official's decision on July 18, 1979. In the petition, he makes reference to alleged new and material evidence in the form of an investigation by the Occupational Safety and Health Administraiton (OSHA) of appellant's complaint of unsafe working conditions, which formed the basis of the dispute on which the removal was taken. He contends, also, that the dismissal of the case was an erroneous interpretation of law or regulation because the April 12 letter stated that it enclosed a designation of representative form "for your convenience," and because the letter of appeal stated that appellant was "my client," so that he believed that it was not mandatory to designate him further. He states, however, that appellant did forward a copy of his power of attorney by letter dated May 18, 1979. The petition then cites *Alberio v. Hampton,* 433 F. Supp. 447 (D.C. Puerto Rico 1977), without further argument as to its relationship to the instant case. Finally, he argues that the imposition of the sanction of dismissal is an unjust hardship when the merits of appellant's case are considered.

The agency responded to the petition on August 14, 1979, and contends that the petition should be found invalid because of appellant's failure to designate a representative even for purpose of filing the petition. It also contends that the evidence submitted is not new and that it does not disprove the reason for the adverse action.

Because the instant petition raises directly the propriety of the dismissal of an appeal in a factual situation which may be repeated in other cases, the Board has decided to REOPEN the case in order to examine this issue and set forth its position on the matter.

The Board has carefully considered the representations of the parties. Inasmuch as the presiding official did not reach the merits

of the arguments against the removal action, we find that the evidence submitted with the petition for review concerning appellant's request for an OSHA investigation, which is unrelated to the question of whether the appeal was prosecuted in accordance with the regulations, is not material to the case in its present posture and, therefore, will not be considered further.

Turning our attention to the dismissal by the presiding official, we find, first, that the petitioner has standing to file the instant petition because the petition was accompanied by an "Authorization Form for General Information," signed by appellant, which designates the petitioner as appellant's attorney for purposes of the case.

Nonetheless, this is a separate matter from the question of the propriety of the dismissal of the case by the presiding official. In connection with this matter, petitioner contends that because the designation form which was enclosed with the letter of April 12 was stated to be "for your convenience," it was unnecessary to submit it. That portion of the letter which is at issue here states the following:

> The Board requires that the parties designate their representative, if any, in writing. If you choose to have a representative and have not already done so, you must notify this office immediately in writing of the name, address, and telephone number of the person you have authorized to act in your behalf. A "Designation of Appellant's Representative" form is enclosed for your convenience. (If you are a representative and have not submitted with your petition a written designation of representative signed by the appellant, you must arrange for the appellant(s) whom you represent to file a designation within ten (10) calendar days after your receipt of this letter. Failure to file the designation(s) within this time period may result in the dismissal of the appeal.)

In addition, the letter stated:

> The Board expects you to cooperate in the expeditious processing of this case. Failure to prosecute the appeal expeditiously may result in its dismissal.

One further portion of the letter which is relevant to this adjudication reads as follows:

> If you did not request a hearing in your petition for appeal, you may amend your petition to submit such a request within ten (10) calendar days after your receipt of this letter. Unless you have requested a hearing by this time, you will have waived your right to a hearing, and the presiding official will adjudicate the case on the record after providing you and the other parties the opportunity to file written submission.

As noted above, no response to this letter had been received when, on May 4, the presiding official informated the parties that "the final date for the receipt of the submissions of both parties and any intervenors" was May 18, 1979, and that the written designation "must be received in this office within the above time limit" or cancellation may result.

We being our examination of the propriety of the presiding official's actions at section 202(a) of the Civil Service Reform Act, Public law 95–454 (92 Stat. 1111 et seq., October 13, 1978), which established the Merit Systems Protection Board. In that section, now codified at 5 U.S.C. 1205, Congress provided that:

> (g) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. * * * All regulations of the Board shall be published in the Federal Register.

In accordance with this statutory authority, the Board published interim regulations to govern its processing of appeals on January 19, 1979, at 44 F.R. 3946 et seq., under which the instant appeal was processed. As noted above, section 1201.31(a) of these regulations requires that all "parties shall immediately designate their representatives, if any, in writing to the presiding official," and section 1201.43(b) provides that an action may be dismissed with prejudice if a party fails to prosecute it. In addition, subsection (c) of the latter section allows the presiding official to "refuse to consider any motion or other action which is not file in a timely fashion in compliance with this Part." Accordingly, section 1201.31 makes it mandatory for the parties to file a written designation of representative, while section 1201.43 leaves it to the discretion of the presiding official to impose an appropriate sanction for failure to comply with the regulations.

In consideration of the above, we find that the presiding official was duly authorized to take the actions which led to the dismissal of the appeal for failure to prosecute, and that she did not abuse her discretion in doing so. In fact, we note that she would have acted in accordance with the regulations in dismissing the March 23, 1979 letter solely because it did not constitute a proper appeal and its defect was not cured in a timely manner. Section 7701(a) of Title 5, U.S. Code, provides that the right to submit an appeal resides in "An employee or applicant for employment." Accordingly, when an appeal is not submitted directly by the appellant, an immediate designation of representative must be filed (5 C.F.R. 1201.31(a)) in order to validate the appeal. Appellant and his attorney failed to comply with this regulation and two requests by the presiding official. Under 5 C.F.R. 1201.43(c), cited above, therefore, the presiding official was authorized to strike from consideration the

petition which failed to comply with the regulatory requirement, as the April 12 letter of acknowledgement stated.

With respect to the propriety of the basis for dismissal which was relied on by the presiding official, the Board has previously issued an Order which disapproved of the action of a presiding official in cancelling an appeal for the failure of a party to comply with his order to produce certain evidence (*In the matter of Larry Bohanon*, 1 MSPB 15 (1979). In that Order, we stated that there is no provision in the interim regulations which allows such an action. We do not find that holding dispositive of the instant case, however, since we stated there that the action which the regulations contemplate, rather than cancellation, is dismissal for failure to prosecute, and that such action is not appropriate for only a single failure to comply with a presiding official's order or request. In the instant case, the presiding official did not base her action on a single failure to respond, but on the continued failure to respond after having been twice warned of the possible results of that conduct. Further, the failure in this case related to the most basic, preliminary matters of the case. The record fails to show that appellant personally signed any correspondence to the field office which indicated his own intention to prosecute his appeal. Indeed, only one letter was received on his behalf, the intial letter of appeal. No request for a hearing was made, and no supplemental representations were submitted, as the appeal letter indicated they would be; nor was there any other response to the April 12 notification of the rights of the parties in connection with the processing of the appeal.

Having found that the presiding official acted within her discretion in dismissing the appeal, we consider the allegation in the petition that the appeal should be reinstated. In addition to the contentions that this should be done because of the availability of new evidence and the misinterpretation of applicable law and regulation, both of which we have found to be without merit, it is contended that the merits of appellant's arguments against the agency's action should be found sufficient to warrant such action. We do not believe, however, that the merits of the agency's action are determinative of the propriety of the dismissal. We note, in this regard, that the Federal Rules of Civil Procedure, which govern civil suits in United States district courts, contain similar sanctions for failure to prosecute or defend a case. Rule 55 provides for the entry of a default judgment for failure to defend, which may only be set aside "for good cause shown," and Rule 41(b) provides that "For failure of the plaintiff to prosecute or comply with these rules or any order of court" the action may be dismissed, and that unless otherwise specified by the court, a dismissal operates as an adjudication on the merits. While these rules do not govern operations

of the Board, we find in them support for the action of the presiding official and against the petition for reinstatement.

In connection with cases processed by the courts in accordance with the Federal Rules, it is generally held that dismissal with prejudice is a severe sanction which should not be imposed lightly, and should be used only if it is determined that other sanctions are inappropriate. however, the courts have recognized their power to dismiss a case *sua sponte* in order to assure orderly and expeditious dispositions, and will not overturn such a dismissal unless it is found to be an abuse of discretion. *Ramsay v. Bailey,* 531 F.2d 706 (5th Cir. 1976), cert. denied 429 U.S. 1107 (1976). As demonstrated above, however, imposition of the sanction of section 1201.43(c) of the regulations, which is generally less severe, would have led to the same disposition in this case because of the nature of the specific failure to comply with the regulations. Further, since no representations on the merits of the case had been advanced, adjudication on the record, although possible, is not a required alternative. Therefore, use of the most drastic sanction, under the circumstances, was in accordance with the regulations and the similar rules governing district court processing of cases.

Contrary to the assertion in the petition, the quoted paragraph of the April 12 letter shows that petitioner was specifically informed that, while the Designation of Representative form itself had been enclosed "for your convenience," a designation in some form, signed by the appellant, was required to be submitted to the field office within 10 days. This was reiterated in the May 4 letter. Concerning the contention that appellant did execute a designation, which was forwarded on May 18, we note that even if the designation had been forwarded to the presiding official on that date, it would not have been in compliance with the notice from the official that all submissions must be received by May 18. Further, as noted above, there is no indication in the record that this letter was received in the field office. The presiding official's decision stated that no submission beyond the initial letter of appeal had been received, and petitioner has introduced no proof that this letter was sent to or received by the official. While the copy of the May 18 letter which was submitted with the petition states that the May 4 letter was not received until May 17 because petitioner had relocated his offices, we note that he apparently neither informed the presiding official at an earlier date of his change of address nor made an effort to contact her prior to the date set for the closing of the record. Finally, in this regard, we note that the May 18 letter fails to indicate that a copy was served on the agency, as required, so that there is no indirect proof of mailing through receipt of a copy by the agency.

As referenced above, 5 U.S.C. 7701(a) provides a right of appeal to the Board to an employee or applicant, and for the representation of the appellant during the course of the appeal. Accordingly, the law makes the right of appeal personal to the employee or applicant, and the imposition of a sanction against the employee or applicant is proper, since the responsibility for the prosecution of his appeal must remain with him whether or not he is represented. The appellant's personal failure to contact the presiding official in a timely manner, in addition to that of his counsel, was responsible for the dismissal of his appeal. Courts have also held the parties responsible for the actions, or inactions, of their counsel, in a similar manner. For a case where the matter was specifically decided when raised in response to a dismissal for failure to prosecute, see *Link V. Wabash Railroad Company,* 370 U.S. 626, 633-634 (1962). See also *Higa v. McLucas,* 549 F.2d 152 (9th Cir. 1977).

Under the circumstances, we find that the presiding official's action was in compliance with the Board's regulations and was not an abuse of the discretion entrusted to her. We find, further, that neither the asserted merit to appellant's defense to the agency's charge nor the alleged new evidence sufficies to show error in the decision below. Finally, petitioner's citation of *Alberio v. Hampton, supra,* is inapposite. That case concerned a conflict of interest in representation, not the situation presented here. Accordingly, having reopened the case in order to examine the issues presented, it is hereby ORDERED that the decision of the presiding official to dismiss the appeal in accordance with section 1201.43(b) of the Board's interim regulations be AFFIRMED.

This is the final decision of the Board.

Appellant is hereby notified of his right to file a civil action in an appropriate U.S. court of appeals or the Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *March 24, 1980.*

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

Washington Field Office

FLOYD E. BENNETT
v.
DEPARTMENT OF THE NAVY

Initial Decision No: DC075299011

Date: June 15, 1979

INTRODUCTION

The appellant filed a petition for appeal on March 28, 1979, from a removal action taken by the Department of the Navy, effective March 9, 1979.

JURISDICTION

Since the appellant received notice that his removal was proposed after January 10, 1979, his appeal is governed by the provisions of the Civil Service Reform Act of 1978. A removal is an action covered by section 7512 of the Act. As an individual in the competitive service who was not serving a probationary or trial period, the appellant is a covered employee (5 U.S.C. 7511(a)(1) who is entitled to appeal to the Merit Systems Protection Board under procedures set forth in section 7701 of the Act.

ANALYSIS AND FINDINGS

By letter dated April 12, 1979, the appellant's attorney was advised that the Board requires the parties to designate their representatives in writing. He was furnished a form for this purpose and was advised that written designation must be filed within 10 calendar days after receipt of the letter. He was specifically informed that failure to file the designation within this time period might result in the dismissal of the appeal.

On April 26, 1979, the agency furnished this office a copy of its submission in response to the appellant's appeal. Included therewith was certification that copies had also been furnished the appellant's attorney and the appellant at his home address. By letter dated May 4, 1979, the appellant's attorney was again advised that failure to receive written designation might result in dismissal of the appeal. A copy of this letter was mailed to the appellant. To date no response has been received from either the appellant or the attorney. The file contains no submission by or on behalf of the appellant beyond the initial letter of appeal.

The Board's regulations provide (5 CFR 1201.31(a) that the parties shall immediately designate their representatives, if any, in writing to the presiding official.

Among the sanctions which may be imposed by a presiding official is (5 CFR 1201.43(b):

> Failure to prosecute: If a party fails to prosecute his/her case or defend an appeal the presiding official may dismiss the action with prejudice or rule for the appellant.

From the fact that the appellant has failed to designate his representative in writing, as required by Board regulation, and has otherwise failed to communicate with the Board concerning the processing of his appeal, I find that he has failed to prosecute his case. I find further that, under these circumstances, imposition of the sanction at 5 CFR 1201.43(b) is warranted.

DECISION

For the reasons discussed above, the sanction at 5 CFR 1201.43(b) is hereby imposed, and the appeal is dismissed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on July 20, 1979 unless a petition for review is filed with the Board within thirty (30) calendar days after the petitioner's receipt of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decison, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be received by the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419 no later than thirty (30) calendar days after receipt of this decision. A copy of the petition must be served on all other parties and intervenors to this appeal.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

> (1) New and material evidence is available that despite due diligence was not available when the decision of the presiding official was issued; or
>
> (2) The decision of the presiding official is based upon an erroneous interpretation of law, rule, or regulation, or a misapplication of established policy; or
>
> (3) The decision of the presiding official is of a precedential nature involving new or unreviewed policy considerations that may have a substantial impact on a civil service law, rule, regulation, or a more Government-wide policy directive.

Under 5 U.S.C. 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

ELIZABETH B. BOGLE,
Presiding Official.